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SUPREME COURT OF THE UNITED STATES

October Term, ~~1960~~

~~No. 14~~ No. 83

B. T. SHELTON, *et al.*, ... *Appellants*

v. No. 14

EVERETT TUCKER, JR., PRESIDENT, ETC., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

MAX CARR, *et al.*, ... *Petitioners*

v. No. 83

R. A. YOUNG, *et al.*, ... *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ARKANSAS

BRIEF FOR RESPONDENTS

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PARAGON PRINTING CO., LITTLE ROCK

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BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 331 S.W. 2nd 701.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioners' brief.

QUESTION PRESENTED

This case involves the validity of the teacher-affidavit law, Act 10, Ark. Acts of 1958 special session. The

petitioners allege that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Act 10, Ark. Acts of 1958 special session which appears as Ark. Stats. (1947) §§80-1229, 80-1230, 80-1231, 80-1232.

STATEMENT

The General Assembly of Arkansas at the Second Extraordinary Session of 1958 enacted Act 10, which Act was approved by the Governor of Arkansas and became effective on September 12, 1958.

Two suits attacking the validity of Act 10 were filed by the petitioners herein and these suits were consolidated in the trial court. Petitioners Max Carr, a Professor at the University of Arkansas and Ernest T. Gephardt, a teacher at Little Rock Central High School, brought these actions for themselves and others similarly situated.

As a condition precedent to employment, Act 10 requires the filing of an affidavit by all administrative personnel and teachers in the public schools, colleges and universities, listing all organizations of which they have been members or to which they have paid dues or made regular contributions within the past five years. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract and fix civil and criminal penalties for the willful filing of a false affidavit.

The petitioners have refused to execute the affidavit as required by Act 10.

ARGUMENT

The principal argument in this case is advanced by a companion brief filed by the other respondents herein which we adopt in its entirety.

Since other aspects of this case are adequately set forth in the companion brief this argument will be confined to the constitutionality of Act 10.

Act 10, unlike other legislative enactments considered by this Court, contains no discharge provision. It merely requires the local school boards and the governing bodies of institutions of higher learning to ascertain past and present organizational memberships of their respective faculties. The right of a public employer to know the organizations to which its employees belong has been recognized in *Garner* v. *Los Angeles Board of Public Works*, 341 U.S. 716; *Adler* v. *Board of Education of the City of New York*, 342 U.S. 483; *Beilan* v. *Board of Education, School District of Philadelphia*, 357 U.S. 399; and *Lerner* v. *Casey*, 357 U.S. 468.

In *Adler* v. *Board of Education of the City of New York, supra*, this Court said:

> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds*, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. . . "

The petitioners cannot demand that they be employed by the school authorities with no investigation of their backgrounds or present and past associations. If they feel that it would be to their detriment or foreign to their beliefs to comply with the provisions of Act 10 they are not forced to do so and are free to seek employment elsewhere. It is true that if they do not comply they can not be employed, but this fact does not deny them any constitutional right, for no teacher in the State of Arkansas has a vested right in his job. In Arkansas teachers are hired on a year-to-year basis and the only specific security that a teacher has beyond the end of a year is the statutory provision that if a teacher is not notified within 10 days after the end of a school year that his contract has not been renewed, it is automatically renewed for the following year. Ark. Stats. (1947) §80-1304(b).

Act 10 was not designed to abrogate the constitutional rights of any member of the teaching profession, but is designed as an aid to the school boards and governing bodies of the colleges and universities in determining an applicant's qualifications and fitness for employment in the respective institutions.

The petitioners further argue that Act 10, even if valid, is subject to being used in an unconstitutional manner. This argument is premised on the ground that, "a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights". To support their argument they rely on *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449; and *Bates* v. *City of Little Rock*, 361 U.S.

516. These cases are readily distinguishable from the case at hand. In the *Alabama* case it was held that the Association could not be compelled by a State court to disclose its membership lists in connection with an action brought by the State on account of its alleged noncompliance with the Alabama statutes dealing with foreign corporations. This Court said: ". . . The issues in the litigation commenced by Alabama. . . were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slighest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them."

The *Bates* case turned on the same distinction that there was "no relevant correlation between the power of the municipalities to impose occupation license taxes and the compulsory disclosure and publication of membership lists of the local branches of the National Association for the Advancement of Colored People".

This Court has recognized many times the "relevancy" and "justification" of obtaining from employees lists of past and present organizations of which they have been, or are, members. It is quite clear that the employers in this case have abundant justification for discovery of the past and present associations of employees.

In further support of their "disclosure" argument the petitioners place their full weight on the testimony of Amis Guthridge. Even the petitioners must in all candor admit that Guthridge does not speak for any except a minority group in Arkansas. His testimony is

wholly insufficient to show that Act 10 will be applied by the State and its agencies in such a way as to violate the petitioners' constitutional rights. Rather the testimony of those actually charged with administering this law is the true criterion of its administration. The President of the University of Arkansas testified that the Board of Trustees had ordered the filed affidavits be held confidential and that they are in a locked file in the secretary's office (R.65). It is also clear from the record that the Little Rock School Board was treating the records confidential (R.77,78).

The petitioners' entire argument on "disclosure" must be summed up as being prospective in nature. This is an improper consideration when the constitutionality of an act is in issue. If a legislative enactment could be adjudged unconstitutional on the basis of hypothetical possibilities of abuse, then the constitutionality of practically every statute would be brought into question. But courts should "avoid constitutional adjudications on merely abstract or speculative issues". *Adler* v. *Board of Education, supra* (Frankfurter, J. dissenting).

If the petitioners' have any fear of the prospective application of Act 10 then their proper remedy will be to bring a suit challenging its unconstitutional use after such abuse has occurred. The Supreme Court of Arkansas at their own instance read into the Act a limitation not there expressed in the following language:

> "We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state 'with an evil eye and an unequal hand'. *Yick Wo* v. *Hopkins*, 118 U.S. 356."

Moreover, even if the affidavits should be made public it still cannot be speculated that any teacher would be discharged for the reason that Act 10 does not require a school board to take any action, regardless what associations are revealed.

CONCLUSION

The petitioners have defied a reasonable legislative enactment of the State of Arkansas. Nothing adduced at the trial shows that Act 10 has been applied in such a way as to violate the petitioner's constitutional rights or that the questioned legislation attempts to inquire about any association other than that properly authorized. The authorization is to secure information properly in aid of the school boards and governing bodies of the colleges and universities in selecting competent personnel.

The decision below was clearly correct. We respectively submit that the judgment below should be affirmed.

Respectfully submitted,

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October 27, 1960

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 83.—OCTOBER TERM, 1960.

B. T. Shelton, et al., Appellants, 14 *v.* Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 *v.* R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Arkansas statute compels every teacher, as a condition of employment in a State supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. At issue in these two cases is the validity of that statute under the Fourteenth Amendment to the Constitution. No. 14 is an appeal from the judgment of a three-judge Federal District Court upholding the statute's validity, 174 F. Supp. 351. No. 83 is here on writ of certiorari to the Supreme Court of Arkansas, which also held the statute constitutionally valid. 106 Ark. Law Rep. 139, 331 S. W. 2d 701.

The statute in question is Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. The provisions of the Act are summarized in the opinion of the District Court as follows:

> "Act 10 provides in substance that no person shall be employed or elected to employment as a superin-

tendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license." 174 F. Supp. 353–354.[1]

[1] The statute is in seven sections. Section 1 provides: "It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided."

Section 2 provides: "No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by

These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision

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public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions."

Section 3 sets out the form of affidavit to be used.

Section 4 provides: "Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence."

Section 5 provides that a teacher filing a false affidavit shall be guilty of perjury, punishable by a fine, and shall forfeit his license to

for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed. Ark. 1947 Stat. Ann. § 80–1304 (b) (1960); *Wabbaseka School District No. 7* v. *Johnson*, 225 Ark. 982, 286 S. W. 2d 841.

The plaintiffs in the Federal District Court (appellants here) were B. T. Shelton, a teacher employed in the Little Rock Public School System, suing for himself and others similarly situated, together with the Arkansas Teachers Association and its Executive Secretary, suing for the benefit of members of the Association. Shelton had been employed in the Little Rock Special School District for twenty-five years. In the spring of 1959 he was notified that, before he could be employed for the 1959–1960 school year, he must file the affidavit required by Act 10, listing all his organizational connections over the previous five years. He declined to file the affidavit, and his contract for the ensuing school year was not renewed. At the trial the evidence showed that he was not a member of the Communist Party or of any organization advocating the overthrow of the Government by force, and that he was a member of the National Association for the Advancement of Colored People. The court upheld Act 10, finding the information it required was "relevant," and relying on

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teach in any school or other institution of learning supported wholly or in part by public funds."

Section 6 is a separability provision.

Section 7 is an emergency clause, reading in part as follows:

"It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

several decisions of this Court, particularly *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Lerner* v. *Casey*, 357 U. S. 468.[2]

The plaintiffs in the State court proceedings (petitioners here) were Max Carr, an associate professor at the University of Arkansas, and Ernest T. Gephardt, a teacher at Central High School in Little Rock, each suing for himself and others similarly situated. Each refused to execute and file the affidavit required by Act 10. Carr executed an affirmation[3] in which he listed his membership in professional organizations, denied ever having been a member of any subversive organization, and offered to answer any questions which the University authorities might constitutionally ask touching upon his qualifications as a teacher. Gephardt filed an affidavit stating that he had never belonged to a subversive organization, disclosing his membership in the Arkansas Education Association and the American Legion, and also offering to answer any questions which the school authorities might constitutionally ask touching upon his qualifications as a teacher. Both were advised that their failure to comply with the requirements of Act 10 would make impossible their re-employment as teachers for the following school year. The Supreme Court of Arkansas upheld the constitutionality of Act 10, on its face and as applied to the petitioners. 106 Ark. Law Rep. 139, 331 S. W. 2d 701.

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[2] In the same proceeding the court held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions. 174 F. Supp. 351.

[3] The affirmation recited that Carr was "conscientiously opposed to taking an oath or swearing in any form . . . ."

I.

It is urged here, as it was unsuccessfully urged throughout the proceedings in both the Federal and State courts, that Act 10 deprives teachers in Arkansas of their rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. In considering this contention, we deal with two basic postulates.

First. There can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler* v. *Board of Education*, 342 U. S. 485, 493. There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." *Beilan* v. *Board of Education*, 357 U. S. 399, 406.[4]

This controversy is thus not of a pattern with such cases as *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the state's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a state's inquiry into the fitness and competence of its teachers.[5]

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[4] The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case.

[5] The declared purpose of Act 10 is "to provide assistance in the administration and financing of the public schools . . . ." The declared justification for the emergency clause is "to assist in the solu-

Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Bates* v. *Little Rock*, *supra*, at 522–523. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes.[6] The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless.[7] Even if

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tion" of problems raised by "the decisions of the United States Supreme Court in the school segregation cases." See note 1. But neither the breadth and generality of the declared purpose nor the possible irrelevance of the emergency provision detract from the existence of an actual relevant state interest in the inquiry.

[6] The record contains an opinion of the State Attorney General that "it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits." The Supreme Court of Arkansas has held only that "the affidavits *need* not be opened to public inspection . . . ." 106 Ark. Law Rep. 139, 144, 331 S. W. 2d 701, 704. (Emphasis added.)

[7] In the state court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.

there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion). "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . . ." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250.

II.

The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their

associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[9]

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[8] In other areas, involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241 (dissenting opinion); *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 83. But cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349.

[9] See Freund, Competing Freedoms in American Constitutional Law, 13 U. of Chicago Conference Series 26, 32–33; Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1, 6, 23–24; Comment, Legislative Inquiry into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L. J. 1159, 1173–1175.

In *Lovell* v. *Griffin*, 303 U. S. 444, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In *Schneider* v. *State*, 308 U. S. 147, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of "fundamental personal rights and liberties" is asserted, "the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." 308 U. S., at 161. In *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court said that "conduct remains subject to regulation for the protection of society," but pointed out that in each case "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U. S., at 304. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, *Martin* v. *Struthers*, 319 U. S. 141; *Saia* v. *New York*, 334 U. S. 558; and *Kunz* v. *New York*, 340 U. S. 290.

As recently as last Term we held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. *Talley* v. *California*, 362 U. S. 60. In that case the Court noted that it had been "urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited . . . . Therefore we do not pass

on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." 362 U. S., at 64.

The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 14 AND 83.—OCTOBER TERM, 1960.

B. T. Shelton, et al., Appellants, 14 v. Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 v. R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

MR. JUSTICE FRANKFURTER, dissenting.

As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment. By way of emphasis I therefore add a few words to the dissent of MR. JUSTICE HARLAN, in which I concur.

It is essential, at the outset, to establish what is not involved in this litigation:

(1) As the Court recognizes, this is not a case where, as in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516, a State, asserting the power to compel disclosure of organizational affiliations, can show no rational relation between disclosure and a governmental interest justifying it. Those cases are relevant here only because of their recognition that an interest in

privacy, in non-disclosure, may under appropriate circumstances claim constitutional protection. The question here is whether that interest is overborne by a countervailing public interest. To this concrete, limited question—whether the State's interest in knowing the nature of the organizational activities of teachers employed by it or by institutions which it supports, as a basis for appraising the fitness of those teachers for the positions which they hold, outweighs the interest recognized in *N. A. A. C. P.* and *Bates*—those earlier decisions themselves give no answer.

"(2) The Court's holding that the Arkansas statute is unconstitutional does not, apparently, rest upon the threat that the information which it requires of teachers will be revealed to the public. In view of the opinion of the Supreme Court of Arkansas, decision here could not, I believe, turn on a claim that the teachers' affidavits will not remain confidential. That court has expressly said that "inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone." 106 Ark. Law. Rep. 139, 144–145, 331 S. W. 2d 701, 704. If the validity of the statute depended on this matter, the pronouncement of the State's highest judicial organ would have to be read as establishing—the earlier view of the State Attorney General notwithstanding—that the statute does not authorize the making public of the affidavits. Even were the Arkansas court's language far more ambiguous than it is, it would be our duty so to understand its opinion, in accordance with the principle that "so far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed." *Fox* v. *Washington*, 236 U. S. 273, 277.

(3) This is not a case in which *Lovell* v. *Griffin*, 303 U. S. 444; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Saia* v. *New York*, 334 U. S. 558; and *Kunz* v. *New York*, 340 U. S. 290, call for condemnation of the "breadth" of the statute. Those decisions struck down licensing laws which vested in administrative officials a power of censorship over communications not confined within standards designed to curb the dangers of arbitrary or discriminatory official action. The "breadth" with which the cases were concerned was the breadth of unrestricted discretion left to a censor, which permitted him to make his own subjective opinions the practically unreviewable measure of permissible speech.[1] Nor is this a case of the nature of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Herndon* v. *Lowry*, 301 U. S. 242,[2] involving penal statutes which the Court found impermissibly "broad" in quite another sense. Prohibiting, indiscriminately, activity within and without the sphere of the Fourteenth Amendment's protection of free expression, those statutes had the double vice of deterring the exercise of constitutional freedoms by making the uncertain line of the Amendment's application determinative of criminality and of prescribing indefinite standards of guilt, thereby allowing the potential vagaries and prejudices of juries, effectively insulated

[1] See also *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147 (the Irvington ordinance); *Largent* v. *Texas*, 318 U. S. 418; *Jones* v. *Opelika*, 319 U. S. 103, vacating 316 U. S. 584 (the Opelika ordinance); *Niemotko* v. *Maryland*, 340 U. S. 268; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films, Inc.*, v. *Department of Education*, 346 U. S. 587; *Staub* v. *Baxley*, 355 U. S. 313; cf. *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517. The common-law count in the *Cantwell* case involved considerations similar to those which were determinative of the decisions cited in text and note, at note 2, *infra*.

[2] See also *Stromberg* v. *California*, 283 U. S. 359; *Winters* v. *New York*, 333 U. S. 507.

against control by reviewing courts, the power to intrude upon the protected sphere. The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility.

Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association, the existence *vel non* of other possible less restrictive means of achieving the object which the State seeks is, of course, a constitutionally relevant consideration. This is not because some novel, particular rule of law obtains in cases of this kind. Whenever the reasonableness and fairness of a measure are at issue—as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action—the availability or unavailability of alternative methods of proceeding is germane. Thus, a State may not prohibit the distribution of literature on its cities' streets as a means of preventing littering, when the same end might be achieved with only slightly greater inconvenience by applying the sanctions of the penal law not to the pamphleteer who distributes the paper but to the recipient who crumples it and throws it away. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413. Nor may a State protect its population from the dangers and incitements of salacious books by restricting the reading matter of adults to that which would be harmless to the susceptible mind of a child. *Butler* v. *Michigan*, 352 U. S. 380. And see *DeJonge* v. *Oregon*, 299 U. S. 353; *Talley* v. *California*, 362 U. S. 60.[3] But the consideration

[3] Language characterizing state statutes as overly broad has sometimes been found in opinions where it was unnecessary to the result, and merely meant to express the idea that whatever state interest was

of feasible alternative modes of regulation in these cases did not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the "narrowest" workable means of accomplishing an end. *See Prince* v. *Massachusetts*, 321 U. S. 158, 169–170. Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the standard of reasonableness, but it does not alter or displace that standard. The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

In the present case the Court strikes down an Arkansas statute requiring that teachers disclose to school officials all of their organizational relationships, on the ground that "many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." Granted that a given teacher's membership in the First Street Congregation is, standing alone, of little relevance to what may rightly be expected of a teacher, is that membership equally irrelevant when it is discovered that the teacher is in fact a member of the First Street Congregation *and* the Second Street Congregation *and* the Third Street Congregation *and* the 4–H Club *and* the 3–H Club *and* half a dozen other groups? Presumably, a

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there asserted as underlying a regulation was insufficient to justify the regulation's application to particular circumstances fairly within the Fourteenth Amendment's protection. Compare *Thomas* v. *Collins*, 323 U. S. 516, with *Fiske* v. *Kansas*, 274 U. S. 380. Compare *Martin* v. *Struthers*, 319 U. S. 141, with *Breard* v. *Alexandria*, 341 U. S. 622.

teacher may have so many divers associations, so many divers commitments, that they consume his time and energy and interest at the expense of his work or even of his professional dedication.—Unlike wholly individual interests, organizational connections—because they involve obligations undertaken with relation to other persons—may become inescapably demanding and distracting. Surely a school board is entitled to inquire whether any of its teachers has placed himself, or is placing himself, in a condition where his work may suffer. Of course, the State might ask: "To how many organizations do you belong?" or "How much time do you expend at organizational activity?" But the answer to such questions could reasonably be regarded by a state legislature as insufficient, both because the veracity of the answer is more difficult to test, in cases where doubts as to veracity may arise, than in the case of the answers required by the Arkansas statute, and because an estimate of time presently spent in organizational activity reveals nothing as to the quality and nature of that activity, upon the basis of which, necessarily, judgment or prophesy of the extent of future involvement must be based. A teacher's answers to the questions which Arkansas asks, moreover, may serve the purpose of making known to school authorities persons who come into contact with the teacher in all of the phases of his activity in the community, and who can be questioned, if need be, concerning the teacher's conduct in matters which this Court can certainly not now say are lacking in any pertinence to professional fitness. It is difficult to understand how these particular ends could be achieved by asking "certain of [the State's] teachers about all their organizational relationships," or "all of its teachers about certain of their associational ties," or all of its teachers how many associations currently involve them, or during how many hours; and difficult, therefore,

to appreciate why the Court deems unreasonable and forbids what Arkansas does ask.

If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. See *Wieman* v. *Updegraff*, 344 U. S. 183, 194 (concurring opinion); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255 (concurring opinion). It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires—and which may not be otherwise acquired than by asking the question which it asks—is germane to that selection. Nor, on this record, can I attribute to the State a purpose to employ the enactment as a device for the accomplishment of what is constitutionally forbidden. Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. *See Yick Wo* v. *Hopkins*, 118 U. S. 356. Because I do not find that the disclosure of teachers' associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State's interest in asking the question, I would affirm the judgments below.

I am authorized to say that MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER agree with this opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 14 and 83.—October Term, 1960.

B. T. Shelton, et al., Appellants, 14 v. Everett Tucker, Jr., etc., et al.	On Appeal From the United States District Court for the Eastern District of Arkansas.
Max Carr, et al., Petitioners, 83 v. R. A. Young, et al.	On Writ of Certiorari to the Supreme Court of Arkansas.

[December 12, 1960.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Whittaker join, dissenting.

Of course this decision has a natural tendency to enlist support, involving as it does an unusual statute that touches constitutional rights whose protection in the context of the racial situation in various parts of the country demands the unremitting vigilance of the courts. Yet that very circumstance also serves to remind of the restraints that attend constitutional adjudication. It must be emphasized that neither of these cases actually presents an issue of racial discrimination. The statute on its face applies to *all* Arkansas teachers irrespective of race, and there is no showing that it has been discriminatorily administered.

The issue is whether, consistently with the Fourteenth Amendment, a State may require teachers in its public schools or colleges to disclose, as a condition precedent to their initial or continued employment, all organizations to which they have belonged, paid dues, or contributed within the past five years. Since I believe that such a requirement cannot be said to transgress the constitu-

tional limits of a State's conceded authority to determine the qualifications of those serving it as teachers, I am bound to consider that Arkansas had the right to pass the statute in question, and therefore conceive it my duty to dissent.

The legal framework in which the issue must be judged is clear. The rights of free speech and association embodied in the "liberty" assured against state action by the Fourteenth Amendment (see *DeJonge* v. *Oregon*, 299 U. S. 353, 364; *Gitlow* v. *New York*, 268 U. S. 652, 672, dissenting opinion of Holmes, J.) is not absolute. *Near* v. *Minnesota*, 283 U. S. 697, 708; *Whitney* v. *California*, 274 U. S. 357, 373 (concurring opinion of Brandeis, J.). Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned action has substantial relevance thereto. See *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 360 U. S. 72.

In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Higher Education*, 357 U. S. 399; see also *Slochower* v. *Board of Education*, 350 U. S. 551. Furthermore, I take the Court to

acknowledge that agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore do not present a situation such as we had in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516, where the required disclosure bears no substantial relevance to a legitimate state interest.

Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail. Cf. *N. A. A. C. P.* v. *Alabama, supra*; *Bates* v. *Little Rock, supra*.

I am unable to subscribe to this view because I believe it impossible to determine *a priori* the place where the line should be drawn between what would be permissible inquiry and over-broad inquiry in a situation like this. Certainly, the Court does not point that place out. There can be little doubt that much of the associational information called for by the statute will be of little or no use whatever to the school authorities, but I do not understand how those authorities can be expected to fix in advance the terms of their enquiry so that it will yield only relevant information.

I do not mean to say that alternatives such as an enquiry limited to the names of organizations of whose character the State is presently aware, or to a class of organizations defined by their purposes, would not be more consonant with a decent respect for the privacy of the teacher, nor that such alternatives would be utterly unworkable. I do see, however, that these alternatives suffer from deficiencies so obvious where a State is bent upon discovering everything which would be relevant to its proper purposes, that I cannot say that it must, as a matter

of constitutional compulsion, adopt some such means instead of those which have been chosen here.

Finally, I need hardly say that if it turns out that this statute is abused, either by an unwarranted publicizing of the required associational disclosures or otherwise, we would have a different kind of case than those presently before us. See *Lassiter* v. *Northampton Elections Board*, 360 U. S. 45, 53–54. All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.

I would affirm in both cases.

Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the [fol. 176] same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of

this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

APPROVED: SEPTEMBER 12, 1958

[fol. 177]

EXHIBIT No. "7"

STATE OF ARKANSAS
OFFICE OF ATTORNEY GENERAL

COPY

May 27, 1959

Honorable George N. Anderson
County Line School Dist. No. 1
Branch, Arkansas

Dear Mr. Anderson:

This will acknowledge your letter of May 18, 1959, concerning the affidavits as required by Act 10 and Act 30 of the 1959 Arkansas General Assembly.

I am of the opinion that the word (swear) may be stricken out and the word (affirm) may be substituted in its place.

Your very truly,

BRUCE BENNETT
Attorney General

/s/ BILL J. DAVIS
By: Bill J. Davis
Assistant Attorney General

BJD:jmh

[fol. 178] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 180]

IN THE SUPREME COURT OF ARKANSAS

No. 5-1978

MAX CARR et al., Appellants,

v.

R. A. YOUNG et al., Appellees.

Appeal from Pulaski Chancery Court, First Division; Murray O. Reed, Chancellor.

Affirmed.

OPINION—February 8, 1960

GEORGE ROSE SMITH, Associate Justice

George Rose Smith, J. This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute.

Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a super-

intendent or principal in any elementary or secondary [fol. 181] school without having first filed with the employing authority an affidavit giving the names and addresses of all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

We do not find Act 10 to be invalid on its face. By § 1 of the act the legislature declared its belief that the public school system would be benefited as a result of the school authorities having the required information about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . the city may impose any reasonable condition upon holding offices within its control."

[fol. 182] The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close

to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *prima facie* validity of Act 10 is pretty well settled by the holding in *Adler* v. *Board of Education of New York*, 342 U.S. 485, where the court sustained a state statute forbidding the employment in the public school system of persons belonging to organizations found to be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time [fol. 183] immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

We conclude, as did the three-judge district court in *Shelton* v. *McKinley*, D.C. Ark., 174 F. Supp. 351, that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitu-
[fol. 184] tional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislative intention, *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W. 2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States

Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand." *Yick Wo* v. *Hopkins*, 118 U.S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at [fol. 185] least some members of the Citizens Councils are so ill-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

Moreover, even if secrecy should not be observed in every instance it still cannot be surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the *Adler* case, *supra*, which mandatorily forbade the employment of persons belonging to subver-

sive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guarantees. We are aware of no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

[fol. 186]

IN THE SUPREME COURT OF ARKANSAS

MAX CARR, et al., Appellants,

vs.

R. A. YOUNG, et al., Appellees.

Appeal from Pulaski Chancery Court, First Division.

JUDGMENT—February 8, 1960

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellants all their costs in this Court, in this cause expended, and have execution thereof.

February 8, 1960.

[fol. 187] [File endorsement omitted]

IN THE SUPREME COURT OF ARKANSAS

Pulaski Chy., 1st Div.

No. 5-1978

MAX CARR et al., Appellants,

v.

R. A. YOUNG et al., Appellees.

PETITION FOR REHEARING—Filed February 16, 1960

Petitioners move that the Court grant a rehearing in captioned cause for the following reason:

The opinion is bottomed upon the erroneous premise that so long as no direct discriminatory action by public officials is based upon the compelled disclosure of associations required by Act 10, that First and Fourteenth Amendment rights of petitioners are not violated. The resultant interplay of governmental and private action set in motion by Act 10, in successfully dissuading teachers from exercising their constitutional rights, or making them targets of abuse if they do, through the publicity made possible by the Act, is ignored by the Court.

Edwin E. Dunaway, Solicitor for Appellants.

BRIEF IN SUPPORT OF PETITION

The admirable admonition contained in the Court's opinion against the use of Act 10 for the purpose for which it was enacted does not alter the fact that the Act makes no requirement that the information in the affidavits be [fol. 188] treated as confidential. There is, consequently, provided by Act 10, with no necessity to justify it, the means by which teachers are subjected to the immediate possibility of publication of their past and present associations.

The United States Supreme Court recognized in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, at p. 1172, that

such publication "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

That court then answered this Court's argument that whatever repressive effect resulted from compelled disclosure follows from *private*, not *state* action. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exercise of state power represented by the production order that private action takes hold," said the court at p. 1172.

In *Watkins* v. *United States*, 354 U.S. 178, 77 S.Ct. 1173, at p. 1184, the United States Supreme Court also recognized the constitutional evil of unnecessary forced revelations about possibly unpopular associations and the resultant deterrent effect upon one's exercising constitutional rights.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. Copies have been served upon opposing counsel by mailing same on February 16, 1960.

Edwin E. Dunaway

[fol. 189]

IN THE SUPREME COURT OF ARKANSAS

No. 5-1978

MAX CARR, et al., Appellants,

vs.

R. A. YOUNG, et al., Appellees.

ORDER DENYING PETITION FOR REHEARING—
February 29, 1960

Rehearing denied.

February 29, 1960.

[fol. 190] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 191]

SUPREME COURT OF THE UNITED STATES

No. 917, October Term, 1959

MAX CARR, et al., Petitioners,

vs.

R. A. YOUNG, et al.

ORDER ALLOWING CERTIORARI—June 20, 1960

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted. The case is set for argument immediately following No. 541. Each case is allotted one hour and thirty minutes for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.